

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

VITAL GARCIA, Appellant	}	FILED COURT OF CRIMINAL APPEALS 1/26/2023 DEANA WILLIAMSON, CLERK
VS.	}	NO.-PD-0679-21
THE STATE OF TEXAS	}	

APPELLANT'S MOTION FOR REHEARING

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, VITAL GARCIA, appellant in the above cause, under authority of Tex. R. App. P. Ann. 79.1 (Vernon 2023) and respectfully asks the Court to grant this motion for rehearing. In support of said motion, appellant would show as follows:

I. Jurisdiction

This appeal lies from appellant's conviction in *The State of Texas vs. VITAL GARCIA*, Cause No. 1533080 in the 179TH Judicial District Court, Harris County, Texas. The record reflects that on January 22, 2019, the Defendant plead NOT GUILTY to Aggravated Assault of a Family Member, Serious Bodily Injury, with a Deadly Weapon, and proceeded to a Jury Trial. On January 25, 2019, the Jury found the Defendant guilty. The Court sentenced the Defendant to 35 years T.D.C.. Notice of Appeal was filed January 25, 2019.

On August 10, 2021, the Fourteenth Court of Appeals reversed and remanded, finding the evidence insufficient to support a conviction of aggravated

assault on a family member resulting in serious bodily injury, but sufficient to establish the elements of aggravated assault.

The Court of Criminal Appeals granted the State’s Petition for Discretionary Review on November 10, 2021. On January 11, 2023, the Court of Criminal Appeals reversed the Fourteenth Court, finding that the the court of appeals erred by concluding that the jury acted irrationally in finding that the victim suffered serious bodily injury.

This Court has jurisdiction pursuant to Tex. R. App. P. 79.1(Vernon Pamphlet 2023).

II. Background

A. Historical Facts

The complainant was conscious when HFD arrived.

The Houston Fire Department (HFD) responded to assist Melendez. HFD emergency medical records indicate that Melendez was “ambulatory on scene” and “conscious and alert” when HFD arrived.

The complainant suffered “flesh wounds.”

Once at the hospital, Melendez, the complainant, was treated by emergency physician Dr. Jordan Smith. According to her medical records that were admitted at trial, the complainant suffered 4 deep lacerations, (i.e., “flesh wounds”) —two entry and two exit wounds— which required twelve staples in total to close.

A “flesh wound” is defined as a wound that breaks the skin but does not damage bones or vital organs. (See Oxford Dictionary, definition of flesh wound). A “laceration is a deep cut or tear in skin or flesh”, i.e., a “flesh wound”. (See Oxford Dictionary, definition of laceration).

*Dr. Smiths testimony contradicts the
medical records.*

Dr. Smith noted that, although the bullets did not strike any of her vital organs, the bullets’ paths were close to her ribs, which have “a lot of vessels right underneath . . . as well as [the vessels] in her thorax.”

However the records state that Melendez was “*neurovascularly intact* (emphasis added) in all four extremities. *Chest x-ray negative for intrathoracic injury* and *right femur x-ray negative for bony injury*. *Doubt vascular injury* given the location of the entrance and exit wounds.” (Emphasis added).

B. On Appeal

On direct appeal, Appellant contended that the evidence was insufficient to establish that the complainant, Melissa Melendez , suffered serious bodily injury. .

“Serious bodily injury” is defined as “bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted

loss or impairment of the function of any bodily member organ.” Tex. Penal Code § 1.07(a)(46).

The Court of Appeals correctly noted that, although Melendez testified that she thought she was going to die, she did not explain the basis for that belief. *See Garcia v. State*, 631 S.W.3d 875 (Tex. App.—Houston [14th Dist.] 2021). The court of appeals also correctly concluded that Dr. Smith’s testimony was insufficient to show that Melendez suffered serious bodily injury, because Smith’s testimony contradicts the medical records.

III. Analysis

This Court's Opinion is based on 1) the complainant’s testimony that she blacked out after entering the ambulance and thought she was going to die, and 2) on Dr. Jordan Smith’s erroneous testimony, in which he disregards the medical records which state that the complainant was “*neurovascularly intact* (emphasis added) in all four extremities. *Chest x-ray negative for intrathoracic injury* and *right femur x-ray negative for bony injury. Doubt vascular injury* given the location of the entrance and exit wounds.” (Emphasis added).

A. Standard of Review

In assessing the sufficiency of the evidence to support a conviction, we consider the evidence in the light most favorable to the verdict and determine whether, based on the evidence and reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

However, after viewing consider the evidence in the light most favorable to the verdict, the record reflects that the State failed to prove that the complainant suffered serious bodily injury, as defined by the Texas Penal Code. Tex. Penal Code § 1.07(a)(46). Consequently, a rational trier of fact *could not have found* beyond a reasonable doubt that the gunshot wounds suffered by the complainant constituted “serious bodily injury” as defined by the Texas Penal Code § 1.07(a)(46).

B. Application-The evidence was insufficient to establish serious bodily injury.

The evidence shows that after the shooting, the complainant was able to walk out of the apartment, get in her car after gathering her keys, wallet and cell phone, and drive her car. (R.R.III., 34). The complainant was in the hospital for only a few hours. (R.R.IV., 42). The complainant did not have surgery. (R.R.III.,

39), and there was no evidence of permanent disfigurement, that the complainant was unable to return to work, or that the *Complainant* suffered a substantial risk of death. The medical records reflect that the complainant suffered from “lacerations” otherwise known as “flesh wounds”. Gunshot wounds do not constitute serious bodily injury per se. *Williams v. State*, 696 S.W.2d 896, 898 (Tex. Crim. App. 1985).

IV. Conclusion

The Fourteenth Court of Appeals majority properly evaluated the case on its facts in determining that the complainant’s injuries were such that they did not meet the definition of “serious bodily injury,” as defined by the Texas Penal Code § 1.07(a)(46). See *also Williams* 696 S.W.2d at 897-98 (holding evidence was insufficient to prove bullet wound constituted serious bodily injury where no testimony was offered suggesting the complainant suffered either a substantial risk of death or a serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ); *Black v. State*, 637 S.W.2d 923, 926 (Tex. Crim. App. 1982) (holding evidence was insufficient to prove bullet wound caused serious bodily injury where although complainant was in the hospital for three days and took two to three months to heal, there was no evidence of the severity of the wound or any permanent damage).

WHEREFORE PREMISES CONSIDERED, appellant prays this Honorable Court will grant this motion for rehearing, reverse this court's opinion, affirm the judgment of the court of appeals, and remand to the trial court for a new punishment hearing.

/s/Sharon E. Slopis

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2023, a true and correct copy of the foregoing Motion for Rehearing was electronically served to the Harris County District Attorney's Office, at da@dao.hctx.net, and to Daniel C. McCrory, Assistant District Attorney, at McCrory_Daniel@dao.hctx.net.

/s/ Sharon E. Slopis
SHARON E. SLOPIS

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ORDER

BE IT REMEMBERED, that on this day came to be heard the foregoing Appellant's Motion for Rehearing and the Court having considered the same, it is hereby ORDERED that Appellant's Motion For Rehearing is GRANTED.

Signed this _____ day of _____, 2023.

JUDGE PRESIDING

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